

1 KEKER & VAN NEST LLP  
ROBERT A. VAN NEST - # 84065  
2 BRIAN L. FERRALL - # 160847  
DAVID SILBERT - # 173128  
3 MICHAEL S. KWUN - #198945  
633 Battery Street  
4 San Francisco, CA 94111-1809  
Telephone: (415) 391-5400  
5 Email: rvannest@kvn.com;  
bferrall@kvn.com; dsilbert@kvn.com;  
6 mkwun@kvn.com

SUSAN CREIGHTON, SBN 135528  
SCOTT A. SHER, SBN 190053  
WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation  
1700 K Street NW, Fifth Floor  
Washington, D.C., 20006-3817  
Telephone: (202) 973-8800  
Email: screighton@wsgr.com;  
ssher@wsgr.com

7  
8 JONATHAN M. JACOBSON, NY SBN 1350495  
CHUL PAK (*pro hac vice*)  
DAVID H. REICHENBERG (*pro hac vice*)  
9 WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation  
10 1301 Avenue Of The Americas, 40th Floor  
New York, NY 10019-6022  
11 Telephone: (212) 999-5800  
Email: jjacobson@wsgr.com; cpak@wsgr.com;  
12 dreichenberg@wsgr.com

13 Attorneys for Defendant ARISTA NETWORKS, INC.

14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA  
16 SAN JOSE DIVISION

17 CISCO SYSTEMS, INC.,

18 Plaintiff,

19 v.

20 ARISTA NETWORKS, INC.,

21 Defendant.  
22  
23  
24  
25  
26  
27  
28

Case No. 5:14-cv-05344-BLF (NC)

**ARISTA'S SUPPLEMENTAL BRIEF  
REGARDING DISGORGEMENT OF  
PROFITS**

Judge: Hon. Beth Labson Freeman

Date Filed: December 5, 2014

Trial Date: November 21, 2016

1 In accordance with the Court’s direction at the September 9, 2016 hearing, Arista  
 2 respectfully submits this brief, limited to one-and-a-half pages (*see* ECF 516 at 72:14-73:1),  
 3 regarding the right to a jury trial on Cisco’s claim for disgorgement of profits after *Petrella v.*  
 4 *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014).

5 Prior to *Petrella*, the U.S. Supreme Court had never addressed whether disgorgement of  
 6 profits under the Copyright Act was a legal or equitable remedy. Thus, courts were inconsistent  
 7 in their treatment of disgorgement claims. *Petrella*, however, settled the question.<sup>1</sup> There, the  
 8 Supreme Court—in assessing whether the equitable defense of laches could bar claims for  
 9 infringement—reviewed the types of relief available under the Copyright Act. *Id.* at 1967–68. It  
 10 held that, although recovery of profits “is not easily characterized as legal or equitable,” “in this  
 11 case,” it is a form of equitable relief. *Id.* at 1967 n.1

12 *Petrella* therefore “place[d] recovery of profits *squarely on the equitable side of the*  
 13 *ledger.*” 3 Nimmer on Copyright, § 12.06[B][3][d][i], at 12-160.4 (emphasis added). And after  
 14 *Petrella*, the only court to decide whether the court or the jury would decide copyright  
 15 disgorgement held that the court would do so.<sup>2</sup> In *Fahmy v. Jay-Z*, No. 2015 U.S. Dist. LEXIS  
 16 139298, Case No. 2:07-cv-05715-CAS (C.D. Cal. Oct. 9, 2015), Judge Snyder in the Central  
 17 District of California ruled that “in light of *Petrella* it appears that the appropriate course is to  
 18 treat the award of profits as an equitable remedy,” and “[t]herefore, the Court will calculate the  
 19 amount [of] profits, if any, to be awarded pursuant to §504(b).” *Id.* at \*3.

20 Cisco may argue that *Petrella*’s use of the phrase “in this case” implies that there may be  
 21 copyright cases where disgorgement is deemed legal rather than equitable. But that misconstrues  
 22 the opinion—reading the statement as a whole, “in this case” refers to disgorgement *under the*  
 23 *Copyright Act*, not to the particular facts before the Court, which the Court did not even allude to.

24 <sup>1</sup> Accordingly, to the extent Cisco cites pre-*Petrella* cases to support its claim that disgorgement  
 25 is a legal remedy (as it did at the September 9 hearing), those cases are no longer good law.

26 <sup>2</sup> As the Court noted at the September 9 hearing, Judge Alsup recently considered copyright  
 27 disgorgement in *Oracle America, Inc. v. Google Inc.*, No. 3:10-cv-03561-WHA, but he deferred  
 28 “rul[ing] on the *Petrella* issue” until after the verdict, *see* May 3, 2016 Order (ECF 1789), and  
 because Google prevailed on liability, he never reached the issue. In meet-and-confer, Cisco  
 asserted that other post-*Petrella* cases have given disgorgement to the jury, but it did not identify  
 any, and Arista has reviewed the cases that cite *Petrella* and found none. Thus, if such a case  
 exists, it presumably does not apply *Petrella*’s teachings, and should be given no weight.

1 In any event, even if it were permissible to deem copyright disgorgement a legal remedy in  
 2 specific cases, there would be no reason to do so here, and the Court is clearly within its authority  
 3 to find it equitable. *See* 3 Nimmer on Copyright, § 12.06[B][3][d][i], at 12-160.4 (noting that “it  
 4 seems best to follow the Supreme Court majority’s lead [in *Petrella*] by presumptively treating  
 5 profits as equitable in nature.”).

6 Indeed, as the Court observed at the September 9 hearing, disgorgement of profits has  
 7 traditionally and repeatedly been characterized as equitable. *See, e.g., Chauffeurs, Teamsters &*  
 8 *Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990) (noting that the Supreme Court  
 9 characterizes damages as “equitable where they are restitutionary, such as in actions for  
 10 disgorgement of improper profits”) (internal quotations and citations omitted)); *Fifty-Six Hope*  
 11 *Road Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059, 1074 (9th Cir. 2015) (“A claim for  
 12 disgorgement of profits under § 1117(a) is equitable, not legal.”); *SEC v. Jasper*, 678 F.3d 1116,  
 13 1130 (9th Cir. 2012) (“Ninth Circuit law is clear that the reimbursement provision of SOX 304 is  
 14 considered an equitable disgorgement remedy and not a legal penalty.”); *Myers v. Merrill Lynch*  
 15 *& Co.*, 1999 U.S. Dist. LEXIS 22642, \*16 (N.D. Cal. Aug. 23, 1999) (“Section 17203 provides  
 16 the remedies that are available in § 17200 claims (equitable relief including injunctions and  
 17 disgorgement).”).

18 Respectfully submitted

19 Dated: September 16, 2016

20 KEKER & VAN NEST LLP

21 WILSON SONSINI GOODRICH & ROSATI

22 By: /s/ Robert A. Van Nest  
 23 ROBERT A. VAN NEST

24 Attorneys for Defendant  
 25 ARISTA NETWORKS, INC.  
 26  
 27  
 28